

**Amendment Under 37 C.F.R. § 1.116
Expedited Procedure – Art Unit 2154**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:

BELOUSSOV *et. al.*

Application No.: 10/826,280

Filed: April 19, 2004

For: **DEDICATION OF ADMINISTRATIVE
SERVERS TO MANAGEMENT OF SERVER
FUNCTIONS IN A MULTI-SERVER
ENVIRONMENT**

Confirmation No.: 9961

Art Unit: 2154

Examiner: PATEL, HARESH N.

Atty. Docket: 2230.0050000/MBR/GSB

Petition under 37 C.F.R. § 1.181

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Statement of Facts - Brief Summary of the Claimed Invention

The present invention is directed to server virtualization. More particularly, the present invention is directed to a single computer system on which multiple servers (Virtual Private Servers) are running. Furthermore, a key aspect of the claimed invention is dedication of a single Virtual Private Server to management of administrative functions of the other Virtual Private Servers.

Statement of Facts - Summary of Prosecution History

Application No. 10/826,280 was filed on April 19, 2004.

A Restriction Requirement was mailed on June 12, 2008.

A Response to the Restriction Requirement was filed on July 8, 2008, electing claims 1-36 for prosecution.

A first Office Action was mailed on September 19, 2008, rejecting the claims under 35 U.S.C. § 102(c) based on Leonard, U.S. Patent No. 7,188,120 and Price, U.S. Patent No. 7,337,445.

A Response to the first Office Action was filed on December 4, 2008. A Declaration under 37 C.F.R. § 1.131 was filed together with the response.

A Notice of Non-compliant Amendment was mailed on March 20, 2009.

A Supplemental Amendment was filed on March 26, 2009, addressing the issues raised in the Notice of Non-compliant Amendment.

A Final Office Action was mailed on July 20, 2009. The rejections were substantially similar to the rejections in the first Office Action, with the addition of the rejections under 35 U.S.C. § 102(b) based on TechOne Hosting (2003).

A Response to the Final Office Action was filed on August 6, 2009, requesting reconsideration.

An Advisory Action was mailed on August 21, 2009, maintaining the rejections.

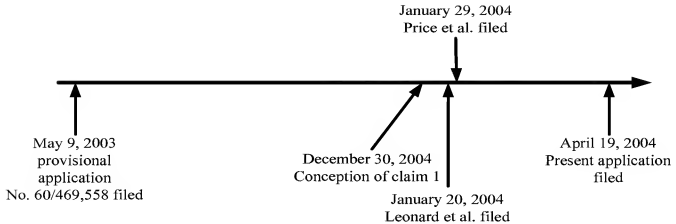
Issues presented in this petition

This petition under 37 C.F.R. § 1.181 addresses several interrelated issues:

1. Examiner's misunderstanding of the law and USPTO practice on establishing the date of conception of the invention, in the context of a Declaration under 37 C.F.R. § 1.131.
2. The Examiner's misunderstanding of the law regarding diligence in constructive reduction to practice, in the context of a Declaration under 37 C.F.R. § 1.131.
3. The Examiner's failure to map the claim elements to the cited references (Leonard, U.S. Patent No. 7,188,120 and Price, U.S. Patent No. 7,337,445).
4. The Examiner's failure to address the issues regarding effective filing dates of Leonard and Price, and the provisional application to which both Leonard and Price claim priority.
5. The Examiner's failure to respond to Applicants' arguments and showing that the relevant claim element is not taught by TechOne Hosting (2003).

Timeline of the Events at Issue - Declaration under 37 C.F.R. § 1.131

In order to clarify the issues under discussion, as they relate to the Declaration under 37 C.F.R. § 1.131, Applicants provide the following timeline:



In other words, as may be seen from the above timeline, the issues relating to the Declaration under 37 C.F.R. § 1.131 can be framed as followed:

1. Is there sufficient evidence of conception prior to January 20, 2004?
2. Is there sufficient evidence of diligence in reduction to practice between January 20 and April 19, 2004?
3. What is the effective date of the Leonard and Price references?

Sufficiency of Evidence to Establish Conception under Rule 131

As part of the Rule 131 Declaration, Applicants have submitted various exhibits to establish conception prior to January 20, 2004. Specifically, Applicants have submitted two emails with attachments, both emails dated December 30, 2003, confirming the conception date of at least December 30, 2003. These emails (See Exhibits A1 and A5), and particularly their attachments (See Exhibits A2, A3, A4 and A6) demonstrate conception of the invention at least as early as December 30, 2003.

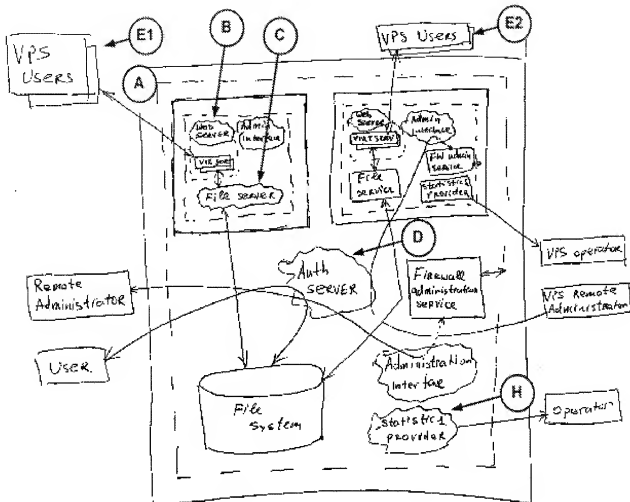
Between the Final Office Action and the Advisory Action, the Examiner has shifted his reasoning regarding conception of the invention. In the Final Office Action, the Examiner
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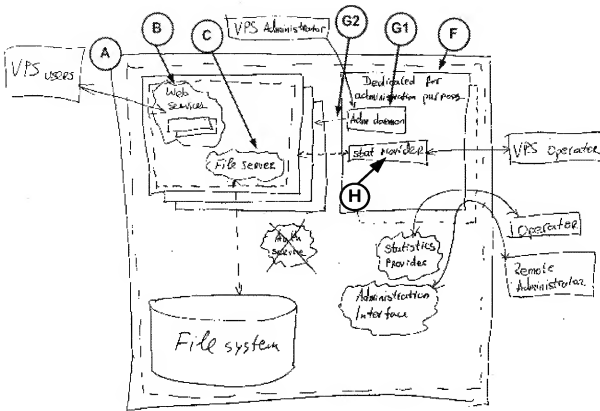
questioned the sufficiency of the evidence itself, see paragraphs 5 and 6 of the Final Office Action. In the Advisory Action, the Examiner is evidently no longer questioning the sufficiency of the evidence of conception itself, but only the dates of the evidence. For the record, Applicants reproduce the evidence below (see also Reply filed on August 6, 2009).

Conception of the invention of claim 1

One of the exhibits, Exhibit A1 is an email dated December 30, 2003, with two attachments, "scheme1" and "scheme2" (3 pages total). The attachments are substantially similar to the figures of the present application. Also, the attachments show every element of, for example, claim 1. The illustrations on the following pages represent the attachments scheme1 and scheme2 to the email of December 30, 2003 (Exhibit A1 of the Declaration), with the letter designations added (see circles with the letters inside and arrows, added for purposes of illustration to the original figures, see also corresponding text in bold, in the claim below):

1. A system for managing administration of computer services provided to users comprising:
 - a computer system; **[See A in the figures on next page]**
 - an operating system running on the computer system; **[inherent in any computer system]**
 - a plurality of server processes **[See B, C, D]** running on the computer system, wherein the processes provide services to a plurality of remote users **[See E1, E2];** and
 - at least one designated Virtual Private Server (VPS) **[See F]** with a set of services that perform administrative operations **[See H – providing statistics is an example of administrative operations]**, wherein the designated VPS **[See F]** provides administrative services **[See G1, G2]** to each of the server processes **[See G2]** and wherein the designated VPS is isolated by a logical isolation of processes **[See box designated by F, see also exhibit A4, line 9 (in Russian) and Exhibit A6, line 10 (English translation of Exhibit A4), discussing isolation of the processes].**





Thus, as may be seen from the above annotated illustrations, and the mapping of claim 1 to the illustrations, Applicants were in possession of the invention at least as of December 30, 2003 – prior to the filing dates of both Price and Leonard.

Confirmation of the date of conception

As best as can be understood from the Advisory Action, the Examiner appears to accept that the exhibits do, in fact, demonstrate conception of at least the invention of claim 1, but – according to the Examiner – do not “prove” (or perhaps prove, but not to his satisfaction) that the exhibits have the date of December 30, 2003.

The Examiner places a higher burden on the Applicants than the case law or USPTO practice require. As stated in the Rule 131 Declaration, Exhibit A1 is an email dated December 30, 2003 (the timestamp is on the email), and Exhibits A2 and A3 are attachments to the email, with the files named “scheme1” and “scheme2”. The Examiner insists that the attachments themselves need a date or timestamp on them. But this is not required by case law or USPTO practice.

The undersigned representative also points out that he has the December 30, 2003 emails in electronic form, and can forward the email to the USPTO (together with the attachment – this would prove that the attachments to the December 30, 2003 emails were exactly as stated). However, the undersigned representative is unaware of a procedure to submit email evidence to the USPTO in this manner. Therefore, Applicants are forced to rely on standard procedures – which is printing out the email and the attachment, and stating in the Declaration that the attachments are exactly what they are. This is exactly what Applicants have done.

Additionally, the Examiner seems to misunderstand Exhibits A5, A4 and A6. A5 is an email, also dated December 30, 2003 (and which also confirms the date of conception of at least December 30, 2003). A4 is an attachment to the email in Russian, and A6 is a translation of the attachment (i.e., of Exhibit A4) into English. (See Declaration under 37 C.F.R. § 1.131, paragraph 6.) The date of Exhibit A6 is recent – 2008 – since it is only a translation generated for purpose of the Rule 131 Declaration. The original attachment (Exhibit A4) existed at least as early as December 30, 2003. As with Exhibits A2 and A3, which are also attachments to an

email (to Exhibit A1), Applicants can think of no other way to demonstrate their dates other than by forwarding the email itself to the USPTO – but this is not standard procedure.

Applicants also point out that **if** they forwarded the email to the USPTO, the attachments could not be “faked” – to the best of the undersigned’s knowledge, it is impossible to fake an attachment in Microsoft Outlook – thereby proving the dates. However, all that is required – in the absence of any reasonable basis for doubt – is a statement in the Declaration to the effect that these attachments were indeed attached to the email of December 30, 2003.

Exhibits as they relate to this application

The Examiner also contended, see Advisory Action, page 2, that

Exhibit A1 itself (which contain dated December 30, 2003) does not mention anything regarding this case and is a mere e-mail, ***which can be for another case or a different purpose.***

In reality, both Exhibit A1 and Exhibit A5 have “matter 19” in the subject line (as do many of the other emails submitted as evidence, see, e.g., Exhibits B4, B5 and B6). “Matter 19” is SWsoft’s (the assignee’s) internal designation for this application, which became Attorney Docket No. 2230.0050000 in the billing records (and ultimately was filed as the present application). Many of the later emails (see Exhibits B1-B10) carry both the “matter 19” designation and the attorney docket number (2230.0050000). The billing records also carry both 2230.0050000 and “matter 19” (“Your ref: 19” or “SWsoft ref: 19”) designation. Applicants do not believe that any additional “evidence”, beyond what was already submitted, is required to establish that these emails do, in fact, all relate to this application.

“All the limitations of the claim”

Additionally, the Examiner stated in the Advisory Action that

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The applicant's statement, "Applicants also respectfully point out that it is sufficient to show conception of only one claim (e.g., claim 1). ", is noted. However, the applicant failed to cite in the MPEP / case law about this requirement that would indeed ignore all other claimed limitations.

The Examiner again misunderstands the requirements regarding establishing conception. Applicants are not ignoring "all other claimed limitations." Applicants are establishing the conception of at least claim 1, using the Rule 131 Declaration and showing where all the limitations of claim 1 are found in the submitted evidence. There is no requirement – not in the MPEP, not in the case law – that the conception of every limitation of every dependent claim be established using the Rule 131 Declaration. This novel "requirement" – that Applicants need to show every limitation of every dependent claim – exists nowhere in the MPEP or in the case law.

Other issues related to confirming conception of the invention of claim 1

Applicants are also uncertain as to what the Examiner means by "a mere email" in the Advisory Action, and why he believes that "mere emails" (as opposed to "non-mere emails" or any other form of documentary evidence) are not evidence supporting Rule 131 Declarations. The Examiner states (page 2):

Exhibit A1 itself (which contain dated December 30, 2003) does not mention anything regarding this case **and is a mere e-mail**, which can be for another case or a different purpose.

Submission of emails is an entirely normal practice, in the context of rule 131 Declarations.

The Examiner also stated, in the Advisory Action, see pages 2-3:

The after final response dated 8/6/2009 also did not respond to statements, "Exhibits under B and C clearly show that the work that was done and mentioned

in the Exhibits B and C (i.e., dated after the concerned date of the cited references used for the rejections) has been missing in the Exhibits A1-A6”.

The Exhibits B1-B10 and C1-C4 indeed show that the applicant did not had possession of the material at the time of A 1, etc., that is presented under B1-B10 & C1-C4, as the applicant is relying on dates of A1 etc., versus the exhibits under B and C that are after the concerned priority date.

Applicants are uncertain as to what the Examiner is looking for here – Exhibits B1-B10 and C1-C4 confirm diligence in reduction to practice, not conception. There is no dispute that Exhibits B1-B10 and C1-C4 are dated after the filing dates of Leonard and Price – which is to be expected, since they establish diligence, not conception.

In sum, the Examiner misunderstands the procedural and legal framework for establishing the date of conception, in the context of Rule 131 Declarations and the mechanisms by which such evidence is submitted to the USPTO.

The Examiner also evidently misunderstands just what it is that the Applicants are trying to overcome with the Rule 131 Declaration. The Examiner states, in the Advisory Action (page 3):

Again, as per the prosecution history, the applicant had not filed either a provisional application or a non-provisional application prior to the April 19, 2004 (after the Exhibit A1 dated December 30, 2003) and has submitted the 35 CFR 1.131 to overcome the rejections that has been made, i.e., 1) Leonard-Sun-Microsystems et al. 7,188,120 (Hereinafter Leonard-Sun-Microsystems¹), filed January 20, 2004, effective priority dated May 9, 2003; and 2) Prince-Sun-Microsystems et al. 7,337,455 (Hereinafter Prince-Sun-Microsystems), filed January 28, 2004, effective priority dated May 9, 2003.

¹ The Examiner refers to the provisional application No. 60/469,558 as “Sun-Microsystems” in the Final Office Action and the Advisory Action, although a more standard reference would be “the ‘558 application” or similar.

Applicants are obviously NOT trying to overcome the Provisional Application No. 60/469,558, filed on May 9, 2003, using the Rule 131 Declaration. The arguments regarding Provisional Application No. 60/469,558 are procedural – that the Examiner only cited the entire 80-page document – not based on dates.

Establishing Diligence for Purposes of Rule 131 Declaration

The Examiner misunderstands the law regarding establishing diligence through constructive reduction to practice, in the context of Rule 131 Declarations. For example, the Examiner seems to confuse the different dates at issue – January 20, 2004 – the filing date of Leonard – and May 9, 2003, the date of the provisional application to which Leonard and Price claim priority.

As stated earlier, Applicants are not trying to establish a date of conception earlier than May 9, 2003, the filing date of the provisional. Applicants are only trying to establish conception prior to the filing date of Leonard (prior to January 20, 2004) and diligence in constructive reduction to practice between January 20, 2004 and April 19, 2004.

The Examiner repeatedly harped on the “three month period” between January 20 and April 19, 2004. For example, the following quotes from the Advisory Action are illustrative:

However, the applicant failed to account each of the gaps. The applicant's mentioning of mere general statements for all gaps together does not justify delay during each individual gap. The applicant failed to provide specific reasons for each individual gap between January 20, 2004 and April 19, 2004, a duration of about three months! Contrary to the applicant's concern, each of the gaps or indeed more than “every single day” or “every day”. The fact is that the applicant is relying on date December 30, 2003 under 35 CRF 1.131. And, for diligence between January 20, 2004 and April 19, 2004, **it not a matter of few days or few weeks but months! – about two-three months!**

....

Since, the applicant failed to account individually each of the gaps for the diligence between January 20, 2004 and April 19, 2004 and the applicant's mentioning of mere general statements for all gaps together does not justify delay during each individual gap; The applicant failed to provide specific reasons for **each individual gap between January 20, 2004 and April 19, 2004, a duration of about three months!**

The Examiner misunderstands how constructive reduction to practice works, and how diligence is established. In fact, there are no three-month gaps. Applicants have shown, through emails and attorney time records, that various activities directed to constructive reduction to practice were performed on the following dates:

January 21, 2004
February 9, 2004
February 18, 2004
February 19, 2004
February 25, 2004
March 24, 2004
March 29, 2004
April 2, 2004
April 4, 2004
April 6, 2004
April 9, 2004
April 15, 2004
April 16, 2004.

Thus, it is meaningless to speak of a "three month gap", since the emails and time records attached as Exhibits B1-B10 and C1-C4 to the Declaration establish continuous and ongoing effort in constructive reduction to practice.

Constructive reduction to practice - activities by inventors

The Examiner misunderstands the law regarding how courts view real-life situations when it comes to constructive reduction to practice and inventors' daily business activities. "Constant effort is not required, and the inventor need not spend all his time working on the

invention.” Donald S. Chisum, 3A:10.07, citing *Mycogen Plant Science, Inc. v. Monsanto Co.*, 252 F.3d 1306, 58 USPQ2d 1891 (Fed. Cir. 2001), *reh'g denied*, 261 F.3d 1345, 59 USPQ2d 1852 (Fed. Cir. 2001) (“To be sure, the evidence suggests that there were short gaps in the work that was done . . . during the critical period. Proof of reasonable diligence, however, does not require a party to work constantly on the invention or to drop all other work. *See Bey v. Kollonitsch*, 806 F.2d 1024, 1028, 231 USPQ 967,970 (Fed. Cir. 1986); *In re Nelson*, 420 F.2d 1079, 1081, 164 USPQ 458, 459 (CCPA 1970); *Gould v. Schawlow*, 363 F.2d 908, 919, 150 USPQ 634, 643 (CCPA 1966).”); *In re Nelson*, 420 F.2d 1079, 164 USPQ 458 (CCPA 1970); *Rines v. Morgan*, 250 F.2d 365, 369, 116 USPQ 145 (CCPA 1957); *Courson v. O'Connor*, 227 F. 890, 894 (7th Cir. 1919).”). Nor is it necessary that the inventor work on the invention daily, as the Court stated in *Hybritech, Inc. v. Abbott Laboratories*, 4 USPQ2d 1001, 1006 (C.D. Calif. 1987), *aff'd*, 849 F.2d 1446, 7 USPQ2d 1191 (Fed. Cir. 1988):

[I]t is not necessary that an inventor be working on the invention every day. The question of diligence is considered in light of all the circumstances. For example, people may be sick or even take vacations (thereby creating gaps in activity) while still being diligent. ... The question is whether they were pursuing their goal in a reasonable fashion. If they were doing the things reasonably necessary to reduce the idea to practice, then they were diligent even if they did not actually work on the invention each day.

Gaps of short duration are often inevitable, and fall within the limits of reasonable diligence, see *Sletzinger v. Lincoln*, 410 F.2d 808, 812-813, 161 USPQ 725, 729 (CCPA 1969). Furthermore, as Applicants have pointed out in the response to the Final Office Action of August 6, 2009, all of the inventors have significant business duties. Serguei Beloussov is the CEO of SWsoft (now Parallels Holdings, Ltd.), the assignee – a company that currently has about 1,000 employees worldwide. Mr. Beloussov is also the majority shareholder of Acronis, Inc., a data
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backup and storage software company, currently with about 500 employees worldwide.

Stanislav Protassov is the Managing Director of the Moscow office of SWsoft/Parallels, with several hundred employees under his supervision. Alexander Tormasov is (and was) the Chief Scientist of Parallels (then SWsoft), and in 2004 also performed a similar role for Acronis.

These circumstances are virtually identical to one of the leading cases on diligence in reduction to practice, *Courson v. O'Connor*, 227 F. 890 (7th Cir. 1919), where the inventor was a businessman in charge of a large industrial enterprise. In *Courson*, the Court, recognizing the realities of life, stated:

In considering the question of diligence, the circumstances surrounding the inventor must be taken into account. Courson was at the head of a large and important shop, in charge of nearly 3,000 men. His time was not his own. Unless he gave up his position, he could ordinarily devote only his own, not his employer's time to his inventions. He could go to Pittsburgh, not when he desired, but when the work at the shop made it convenient. ... **The exercise of reasonable diligence in preparing and filing his application does not require an inventor to devote his entire time thereto, or to abandon his ordinary means of livelihood.**" 227 F. at 894.

The present situation is exactly as described in the *Courson* case, where it would be completely unreasonable to expect senior company officials to drop all their other duties and devote their entire time to a patent application. See also *Gould v. Schawlow*, 363 F.2d 908, 919, 150 USPQ 634,643 (CCPA 1966) ("reasonable diligence does not require that one abandon his means of livelihood to further his reduction to practice.").

The Examiner, in the Advisory Action contended:

The applicant has provided mere general statements, i.e., regarding day to day life, etc., which applies to almost each and every applicant and considering the applicant provided statements all applicant would attempt to overcome prior arts using similar day to day life style related statements. Each of the individual

gaps indeed require specific reasons for justifying the delay. For example, an applicant being hospitalized or away for similar need, etc., rather day to day activity as an excuse.

It is unclear to Applicants what, specifically, the Examiner would like to see as additional “evidence” in this case. As stated earlier, all three inventors have significant business duties, and case law does not require them to account for every single day, see the *Courson* and *Gould* cases, cited above. Being a CEO of a 1000-person company, or being the Managing Director of an office with several hundred employees, are not “mere general statements.” The Examiner simply misunderstands the law on constructive reduction to practice.

Constructive reduction to practice - activities by patent attorney

Additionally, courts recognize that patent attorneys are also not required to drop everything they do and work only on the particular application. See *Gould v. Schawlow*, 363 F.2d 908, 916, 150 USPQ 634 (CCPA 1966); *Rines v. Morgan*, 250 F.2d 365, 369, 116 USPQ 145, 148 (CCPA 1957) (“it is not necessary that an inventor or his attorney should drop all other work and concentrate on the particular invention involved; and if the attorney has a reasonable backlog of work which he takes up in chronological order and carries out expeditiously, that is sufficient.”). Here, the patent application at issue was drafted by the undersigned. Time records confirming work by the patent attorneys at Sterne Kessler Goldstein & Fox on constructive reduction to practice were submitted as Exhibits C1-C4.

Additionally, during the relevant time period, the undersigned representative worked on other applications relating to the same client (SWsoft). The billing records for January 2004 – April 2004 are attached to this petition. These records relate to SWsoft’s other patent

applications that were being worked on at the time, and which were carried under various docket numbers as follows:

Docket No. 2230.0010004 (became Appl. No. 10/837,757, entitled *Virtual Private Server with Enhanced Security*);

Docket No. 2230.0020000 (became Appl. No. 10/725,016, entitled *System, Method and Computer Program Product for On-The-Fly Patching of Executable Code*);

Docket No. 2230.0040000 (became Appl. No. 10/793,881, entitled *System, Method, and Computer Program Product for Group Scheduling of Computer Resources*);

Docket No. 2230.0060001 (became Appl. No. 10/837,618, entitled *System, Computer Program Product and Method for Online Data Migration with Minimal Down-Time*).

As the attached billing records show, work by patent attorneys on these four applications was performed on the following dates:

January 26, 2004
January 30, 2004
February 2, 2004
February 4, 2004
February 17, 2004
March 8, 2004
April 3, 2004
April 5, 2004
April 8, 2004
April 12, 2004
April 13, 2004
April 14, 2004

These circumstances are similar to *Bey v. Kollonitsch*, 806 F.2d 1024, 231 USPQ 967 (Fed. Cir. 1986), where the Court found sufficient diligence when a single attorney worked on a group of patent applications relating to the same subject matter and for the same client, even

though no priority was given to any particular application. *See also* Donald S. Chisum, 3A:10.0794][c].

It is also relevant, see *Bey v. Kollonitsch*, cited above, that all of the work for SWsoft was on applications related to virtualization and virtual private servers. As such, this situation fits in squarely with that discussed by the Court in *Bey v. Kollonitsch*, where the patent attorney was working on a series of related applications. The “related applications” in this case do not need to be related in the sense of parent-child, continuations or continuations-in-part – it is sufficient that they be merely related to the same subject matter and for the same client. That is exactly the case here – all of these SWsoft applications are related to the same subject matter – servers, virtualization and virtual servers.

Combining both sets of dates on which work was performed during the relevant time period (January 20, 2004 through April 19, 2004), there is confirmed and documented activity on the following dates:

January 21, 2004
January 26, 2004
January 30, 2004
February 2, 2004
February 4, 2004
February 9, 2004
February 17, 2004
February 18, 2004
February 19, 2004
February 25, 2004
March 8, 2004
March 24, 2004
March 29, 2004
April 2, 2004
April 3, 2004
April 4, 2004

April 5, 2004
April 6, 2004
April 8, 2004
April 9, 2004
April 12, 2004
April 13, 2004
April 14, 2004
April 15, 2004
April 16, 2004

Thus, in light of the evidence submitted previously (See Exhibits B1-B10 and C1-C4 of the Declaration under Rule 131), and the billing records attached to this petition, Applicants respectfully submit that the Examiner misunderstands the case law as it relates to constructive reduction to practice and in the context of Rule 131 Declarations. As such, Applicants believe that sufficient evidence has been submitted to establish a date of conception prior to the filing dates of Leonard and Price and sufficient diligence in reduction to practice has also been demonstrated between their filing dates and April 19, 2004.

Effective Priority Date of Leonard and Price

At the outset, Applicants are not arguing the technical merits of the rejection in this petition – only the Examiner’s failure to state where, in an 80 page document, he sees the claimed features.

Here, a separate question from what is taught by the Leonard and Price references (to be further discussed below) is the question of whether the Examiner can rely on the provisional application to which they claim priority (Provisional Appl. No. 60/469,558, which the Examiner calls “Sun-Microsystems”), for rejections of the claims. On several occasions, Applicants have pointed out that the Provisional Application No. 60/469,558, does not teach all of the limitations of claim 1, specifically, “at least one designated Virtual Private Server (VPS) with a set of

services that perform administrative operations, wherein the designated VPS provides administrative services to each of the server processes ...” Applicants have repeatedly requested that the Examiner explain where he believes the relevant disclosure is found. **Thus far, all that the Examiner could cite was the entire document, which is 80 pages long.** This clearly does not comply with normal practice regarding § 102 rejections.

Applicants also believe that, since the Examiner is relying on the provisional for the effective dates for Leonard and Price, the burden shifts to the Examiner to demonstrate with specificity where the relevant feature is taught by the provisional. In the absence of such a showing, the Examiner cannot rely on the provisional for the rejections, and therefore the only relevant dates at issue are December 30, 2003 – the date of conception of claim 1 – and the filing date (and only the filing date) of Leonard and Price (January 20, 2004 and January 29, 2004). In sum, unless the Examiner can point out where the relevant claimed feature at issue is found in Provisional Application No. 60/469,558 – which thus far he has failed to do – Applicants have overcome the Leonard and Price references.

Propriety of Final Rejections under 35 U.S.C. § 102(e) based on Price and Leonard

Aside from the Rule 131 Declaration, Applicants believe it is appropriate to raise the question of the inadequacy of the § 102 rejections based on Leonard and Price themselves. **Again, Applicants are not arguing the technical merits of the rejection in this petition – only the Examiner’s failure to state where, in the cited reference, he sees the claimed features.**

Specifically, the Examiner cited the entire column 5 of Leonard as allegedly disclosing the claimed limitation of “at least one designated Virtual Private Server (VPS) with a set of
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services that perform administrative operations, wherein the designated VPS provides administrative services to each of the server processes ...” Applicants have requested that the Examiner explain with additional specificity where, in column 5, he believes he finds the teaching of this element. (See, e.g., Reply filed on August 6, 2009). In none of the Office Actions (the first Office Action, the Final Office Action, the Advisory Action) did the Examiner ever cite anything other than the entire column 5.

The Examiner also cited the entire column 5 of Price as allegedly disclosing this aspect. Applicants find it impossible to respond to such rejections, without a meaningful citation to Leonard or Price. Applicants therefore believe that these “shotgun” rejections, in their current form, are improper.

Propriety of Final Rejections under 35 U.S.C. § 102(b) based on TechOne Hosting

As with the rejections based on Leonard and Price, Applicants believe that it is appropriate to raise a similar issue with regards to TechOne Hosting (2003), cited in the Final Office Action (but **not** in the first Office Action). Applicants have explained at length, in the response filed on August 6, 2009, why TechOne Hosting fails to disclose the claimed aspect of “at least one designated Virtual Private Server (VPS) with a set of services that perform administrative operations, wherein the designated VPS provides administrative services to each of the server processes ...” The only thing that the Advisory Action stated regarding the TechOne Hosting issue is:

TechOne-Hosting are not limited as concluded by the applicant. Leonard-Sun-Microsystems, Prince-Sun-Microsystems, TechOne-Hosting discloses the broadly claimed limitations, i.e., please see the cited portions among other places of the cited art that not only contain the applicant concerned content of the art but also the relied upon limitations.

It is unclear to Applicants whether the Examiner considered Applicants' response of August 6, 2009 regarding TechOne Hosting, since it does not appear that the comments in the Advisory Action are responsive to anything that Applicants argued. Thus, Applicants believe that here, as with the 102(c) rejections, the 102(b) rejections based on TechOne Hosting are improper.

Action requested

In view of the above, Applicants respectfully request that the rejections be withdrawn, and the application be allowed.

It is not believed that extensions of time or fees for net addition of claims are required beyond those that may otherwise be provided for in documents accompanying this paper. However, if additional extensions of time are necessary to prevent abandonment of this application, then such extensions of time are hereby petitioned under 37 C.F.R. § 1.136(a), and any fees required therefor (including fees for net addition of claims) are hereby authorized to be charged to our Deposit Account No. 50-3523.

Respectfully submitted,

BARDMESSER LAW GROUP

/GB/

George S. Bardmesser
Attorney for Applicants
Registration No. 44,020

Date: September 2, 2009

1025 Connecticut Avenue, N.W., Suite 1000
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(202) 293-1191



Jamie Marraccini
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February 18, 2004
Invoice # 10029079
Page 1

Our Matter # 2230.0040000

System, Method and Computer Program Product for Group Scheduling of
Computer Resources

Nonprovisional Application
Your Ref: 18

For professional services through January 31, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
01/02/04	work on application, specification, claims and figures;	GSB	1.90
01/05/04	work on application, specification, claims and figures;	GSB	3.20
01/21/04	work on application, specification, claims and figures;	GSB	1.90
01/26/04	work on application	GSB	1.40

Summary of Fees

	Hours	Rate/Hr	Dollars
GS Bardmesser	8.40	290.00	2,436.00
Total	8.40		2,436.00

Total Fees for Professional Services... \$ 2,436.00

Jamie Marraocini
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February 18, 2004
Invoice # 10029079
Page 2

Other Charges

Long Distance Telephone 290.00

Other Charges.....	\$ 290.00
TOTAL DUE FOR THIS MATTER.....	\$ 2,726.00

Jamie Marraocini
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February 18, 2004
Invoice # 10029079
Page 3

Our Matter # 2230.0050000

Utilization of Group of Computer Services in Multi-user Environment
Nonprovisional Application
Your Ref: 19

For professional services through January 31, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
01/05/04	work on application, specification, claims and figures;	GSB	3.90
01/06/04	work on application, specification, claims and figures;	GSB	2.80
01/08/04	work on application, specification, claims and figures;	GSB	2.10
01/09/04	telephone conference with client; work on application, specification, claims and figures;	GSB	2.30
01/12/04	work on application, specification, claims and figures;	GSB	1.40
01/13/04	work on application, specification, claims and figures;	GSB	1.50
01/14/04	work on application, specification, claims and figures;	GSB	.60
01/15/04	work on application, specification, claims and figures;	GSB	.70
01/21/04	work on application, specification, claims and figures;	GSB	1.70

Summary of Fees

	Hours	Rate/Hr	Dollars
GS Bardmesser	17.00	290.00	4,930.00

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February 18, 2004
Invoice # 10029079
Page 4

	Hours	Rate/Hr	Dollars
Total	17.00		4,930.00
Total Fees for Professional Services...			\$ 4,930.00
<u>Other Charges</u>			
Long Distance Telephone			325.00
Other Charges.....			\$ 325.00
TOTAL DUE FOR THIS MATTER.....			\$ 5,255.00

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February 18, 2004
Invoice # 10029079
Page 5

Our Matter # 2230.0060001

Method for Online Data Migration with Minimal Down-time

Nonprovisional Application
Your Ref: 19

For professional services through January 31, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
01/30/04	work on application, specification, claims and figures;	GSB	1.90

Summary of Fees

	<u>Hours</u>	<u>Rate/Hr</u>	<u>Dollars</u>
GS Bardnesser	1.90	290.00	551.00
Total	1.90		551.00
Total Fees for Professional Services...			\$ 551.00
TOTAL DUE FOR THIS MATTER.....			\$ 551.00

Jamie Marneccini
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March 19, 2004
Invoice # 10029520
Page 3

Our Matter # 2230.0040000

System, Method and Computer Program Product for Group Scheduling of
Computer Resources

Nonprovisional Application
Your Ref: 18

For professional services through February 29, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
02/02/04	review patent application;	JTH	1.50

Summary of Fees

	Hours	Rate/Hr	Dollars
JT Helvey	1.50	315.00	472.50
Total	1.50		472.50
Total Fees for Professional Services...			\$ 472.50
TOTAL DUE FOR THIS MATTER.....			\$ 472.50

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March 19, 2004
Invoice # 10029520
Page 4

Our Matter # 2230.0050000

Utilization of Group of Computer Services in Multi-user Environment

Nonprovisional Application
Your Ref: 19

For professional services through February 29, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
02/18/04	further revise specification per instruction from A. Tormasov;	GSB	.80
02/18/04	review and revise application;	MBR	3.00
02/19/04	work on application, specification, claims and figures;	GSB	1.50
02/25/04	work on application, specification, claims and figures;	GSB	.50

Summary of Fees

	Hours	Rate/Hr	Dollars
GS Bardnesser	2.80	290.00	812.00
M Ray	3.00	425.00	1,275.00
Total	5.80		2,087.00
Total Fees for Professional Services...			\$ 2,087.00
TOTAL DUE FOR THIS MATTER.....			\$ 2,087.00

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March 19, 2004
Invoice # 10029520
Page 5

Our Matter # 2230.0060001

Method for Online Data Migration with Minimal Down-time

Nonprovisional Application
Your Ref: 19

For professional services through February 29, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
02/04/04	work on specification, claims and figures;	GSB	1.30
02/17/04	work on application, specification, claims and figures;	GSB	2.30

Summary of Fees

	Hours	Rate/Hr	Dollars
GS Bandnesser	3.60	290.00	1,044.00
Total	3.60		1,044.00

Total Fees for Professional Services...	\$ 1,044.00
TOTAL DUE FOR THIS MATTER.....	\$ 1,044.00

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April 26, 2004
Invoice # 10030186
Page 6

Our Matter # 2230.0030000

Dedication Of Administrative Servers To Management Of Server
Functions In A Multi-Server Environment

Nonprovisional Application
Your Ref: 19

For professional services through March 31, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
03/29/04	revise application per A. Tormasov's comments; telephone conference with A. Tormasov;	GSB	.90

Summary of Fees

	<u>Hours</u>	<u>Rate/Hr</u>	<u>Dollars</u>
GS Bardmesser	.90	290.00	261.00
Total	.90		261.00
Total Fees for Professional Services...			\$ 261.00
TOTAL DUE FOR THIS MATTER.....			\$ 261.00

Jamie Marraccini
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April 26, 2004
Invoice # 10030186
Page 5

Our Matter # 2230.0040000

System, Method and Computer Program Product for Group Scheduling of
Computer Resources

Nonprovisional Application
Your Ref: 18

For professional services through March 31, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
03/08/04	review application filing;	JTH	.40

Summary of Fees

	<u>Hours</u>	<u>Rate/Hr</u>	<u>Dollars</u>
JT Helvey	.40	315.00	126.00
Total	.40		126.00
Total Fees for Professional Services...			\$ 126.00

Other Charges

Duplicating/Scanning	40.60	
Postage	2.44	
PTO Messenger	10.00	
Utility Filing Fee	385.00	
Claims over 20	349.00	
Assignment Recordation	40.00	
Other Charges.....		\$ 827.04
TOTAL DUE FOR THIS MATTER.....		\$ 953.04

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May 27, 2004
Invoice # 10030875
Page 3

Our Matter # 2230.0010004

Virtual Private Server with Isolation of System Components

CIP Application
Your Ref: 20

For professional services through April 30, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
04/05/04	telephone conference with A. Tormasov regarding Continuation-in-Part;	GSB	1.10
04/08/04	work on application, specification, claims and figures;	GSB	2.30
04/09/04	work on application, specification, claims and figures;	GSB	2.90
04/12/04	work on application, specification, claims and figures;	GSB	2.90
04/13/04	work on application, specification, claims and figures;	GSB	2.90
04/14/04	work on application, specification, claims and figures;	GSB	2.70
04/15/04	work on application, specification, claims and figures;	GSB	2.50
04/16/04	work on application, specification, claims and figures;	GSB	1.20
04/26/04	revise application; meeting with M. Ray;	GSB	2.40
04/26/04	review and revise application; internal office conference with G. Bardmesser regarding same;	MBR	3.90
04/29/04	work on application, specification, claims and figures;	GSB	.80
04/30/04	revise application per inventor comments;	GSB	2.30

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May 27, 2004
Invoice # 10030875
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<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
<u>Summary of Fees</u>			
	Hours	Rate/Hr	Dollars
GS Bardmesser	24.00	290.00	6,960.00
M Ray	3.90	425.00	1,657.50
Total	27.90		8,617.50
Total Fees for Professional Services...			\$ 8,617.50
<u>Other Charges</u>			
Long Distance Telephone			425.00
Other Charges.....			\$ 425.00
TOTAL DUE FOR THIS MATTER.....			\$ 9,042.50

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May 27, 2004
Invoice # 10030875
Page 6

Our Matter # 2230.0030000

Dedication Of Administrative Servers To Management Of Server
Functions In A Multi-Server Environment

Nonprovisional Application
Your Ref: 19

For professional services through April 30, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
04/04/04	work on application;	GSB	2.10
04/06/04	review final application, formal papers, and letter forwarding same to client;	MBR	.40
04/09/04	review filing documents;	GSB	.30
04/15/04	review and revise application, and associated filing papers;	MBR	.30
04/19/04	revise and file application with formal documents;	GSB	1.30
04/19/04	review application filing;	JTH	.40

Summary of Fees

	Hours	Rate/Hr	Dollars
GS Bardmesser	3.70	290.00	1,073.00
JT Helvey	.40	315.00	126.00
M Ray	.70	425.00	297.50

Total	4.80		1,496.50
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Total Fees for Professional Services... \$ 1,496.50

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May 27, 2004
Invoice # 10030875
Page 7

Other Charges

Duplicating/Scanning	50.60
Long Distance Telephone	105.00
Postage	11.15
PTO Messenger	10.00

Other Charges.....	\$ 176.75
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TOTAL DUE FOR THIS MATTER.....	\$ 1,673.25
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May 27, 2004
Invoice # 10030875
Page 8

Our Matter # 2230.0060001

System, Computer Program Product And Method For Online Data
Migration With Minimal Down-Time

Nonprovisional Application
Your Ref: 19

For professional services through April 30, 2004
including the following:

<u>DATE</u>	<u>SERVICE</u>	<u>PROF</u>	<u>HOURS</u>
04/03/04	work on application;	GSB	1.90
04/17/04	work on application;	GSB	1.30
04/19/04	work on application, specification, claims and figures;	GSB	1.10
04/20/04	work on application, specification, claims and figures;	GSB	2.30
04/21/04	work on application, specification, claims and figures;	GSB	1.90
04/22/04	work on application, specification, claims and figures; revise application and formal documents;	GSB	2.50

Summary of Fees

	<u>Hours</u>	<u>Rate/Hr</u>	<u>Dollars</u>
GS Bardmesser	11.00	290.00	3,190.00
Total	11.00		3,190.00
Total Fees for Professional Services...			\$ 3,190.00
TOTAL DUE FOR THIS MATTER.....			\$ 3,190.00

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April 26, 2004
Invoice # 10030186
Page 2

Other Charges.....	\$ 360.00
TOTAL DUE FOR THIS MATTER.....	\$ 1,085.50